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No. 72-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KENNECOTT COPPER CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Kennecott Copper Corporation hereby petitions for rehearing of the Court's order entered April 1, 1974 denying its petition for certiorari.

The ground for this petition is that the decisions below, in evaluating competitive effects in the coal industry, failed to take into account the primary measure of competitive capability found to be controlling by the entire Court in *United States* v. *General Dynamics Corp.*, No. 72-402, decided March 19, 1974 (see Rule 19(1)(b) and Rule 58(2) of the Rules of this Court).

Accordingly, this case should be remanded for reconsideration by the Federal Trade Commission in light of *General Dynamics.*

The Court held in *General Dynamics* that "fundamental changes in the structure of the market for coal"—including "most significantly" the considerable and growing importance of sales to utilities under long-term contracts—have produced a "focus of competition" in the sale of coal different from that in, for example, the sale of groceries or beer. As a consequence, the Court held, evaluation of competitive effects in a coal merger case should be based on "uncommitted reserves of recoverable coal" rather than past production statistics. (Slip Opinion 12-15)

Although dividing 5-4 on the ultimate disposition of the appeal in *General Dynamics*, the Court was unanimous on the fundamental point that uncommitted reserves, and not production statistics, were the proper basis of analysis. The dissenting Justices fully agreed that "uncommitted reserves or sales of previously uncommitted coal would be preferable indicia of competitive strength" and would have remanded for further findings based on these "correct legal standards" (Dissent Slip Opinion 15-17).

The two crucial determinations upon which the Court of Appeals and the Federal Trade Commission based their decisions in this case were made in total disregard of what this Court has now held must be the foundation of analysis in such a case:

First, the determination that there was an "alarming trend" toward high concentration in the coal business (A10-13, B15-18, 25) was based entirely upon a comparison of production statistics for 1967 and 1954. There was no analysis, none at all, of how the uncommitted reserves—or the current success in making new sales—of the "top 4"

and "top 8" *producers* compared with other companies or the industry as a whole at the time of the acquisition.

Second, the determination that "no other likely entrants [into the coal business] were shown to exist" (A20) or, in the Commission's words, that "there is no record evidence with respect to these potential entrants" (B54) did not take into account the extensive record evidence (see C81-83) showing that many strong companies were at the "edge" of the coal business through their ownership of extensive reserves, and some were actually in the process of entering by selling from those reserves.[1] It is these very "non-existent" companies that are now—in the "future" with which the trial in 1969 was concerned—enjoying dramatic success in competing for *current* sales with older producers, as discussed briefly in our Supplemental Brief filed February 14, 1974.

Moreover, in denying the existence of a number of actual and potential new entrants into the coal business, the Commission (and the Court of Appeals, following the Commission) not only adopted an analytical approach in conflict with that now required by this Court, but reached a *conclusion* contrary to that stated by this Court in *General Dynamics* on the same question of economic fact and *on the basis of representations by the Solicitor General.* The Court stated in *General Dynamics* (Slip Opinion 22):

> "As the Government pointed out in its brief and at oral argument, in recent years a number of com-

[1] The Commission noted the ownership of reserves by "oil companies, natural gas companies, electric utilities, and railroads" but, citing five pages of testimony, said these companies were not potential entrants (B54). None of the cited testimony provides any support whatsoever for such a conclusion, and our Supplemental Brief shows by reference to the record and subsequent events that such companies were potential entrants which became actual entrants.

> panies with no prior experience in extracting coal have purchased coal reserves and entered the coal production business in order to diversify and complement their current operations."

Both the Department of Justice and the Federal Trade Commission are heard before the Court thorugh presentation by the Solicitor General and representations made in behalf of one agency may hardly be disavowed in behalf of the other.

The conflict between *General Dynamics* and the decisions below can only be compounded by the fact that in the brief period between the announcement of *General Dynamics* and the denial of the petition for certiorari herein, the Commission itself released a 483-page report by its Bureau of Economics which reaches the same conclusions as to analysis of competition in the coal business as did the Court.

The Bureau viewed information about ownership of reserves to be necessary to prediction of future production and concentration trends, stated that "many non-coal producers (including petroleum companies) have acquired coal lands in the past decade," observed that "the trend toward petroleum firm participation in the coal industry is expected to accelerate in the future," and concluded that this could result in a reduction in concentration of coal production. FTC, BUREAU OF ECONOMICS, CONCENTRATION LEVELS AND TRENDS IN THE ENERGY SECTOR OF THE U.S. ECONOMY 136, 150-51, 207 (1974).[2]

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[2] The 1974 report also follows all earlier FTC reports (see Petition for Certiorari 16-17) in concluding that "the extensive record of interfuel competition . . . suggests that, in a long-run time framework, the four primary fuels trade in a common market." *Id.* at 30. Far from being a "dominant" firm, Peabody is said to be only the 12th ranked energy producer, accounting for only 2.2% of total production as measured in dollars. *Id.* at 235.

The articulated grounds of the decisions of the Federal Trade Commission and the Court of Appeals conflict irreconcilably with the analysis mandated by this Court's decision in *General Dynamics*. The existence of such a conflict is one of the "considerations governing review on certiorari" set forth in Rule 19(1)(b) of the Rules of this Court, and the public policy underlying this consideration is basic—proper, fair and uniform application of the law. Moreover, to permit such a conflict to remain would create unwarranted uncertainty in the application of Section 7 of the Clayton Act in an area of continuing significance.

In view of the foregoing, certiorari should be granted on rehearing, the decision of the Court of Appeals vacated, and the case remanded with instructions to remand to the Federal Trade Commission for reconsideration in light of the Court's decision in *United States* v. *General Dynamics Corp.*

Respectfully submitted,

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April 3, 1974

Certificate of Counsel

Pursuant to Rule 58(2) of the Rules of this Court, we hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in said Rule.

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